



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: AUGUST 04, 2022

IN THE MATTER OF:

Appeal Board No. 623542 A

PRESENT: MICHAEL T. GREASON, MEMBER

In Appeal Board Case Nos. 623541 A, 623542 A and 623543 A, the claimant applied to the Appeal Board pursuant to Labor Law § 534 for a reopening and

reconsideration of Appeal Board Nos. 619565, 619566 and 619567, which affirmed the decisions of the Administrative Law Judge filed November 3, 2021, that sustained the initial determinations disqualifying the claimant from receiving benefits, effective March 30, 2020, on the basis that the claimant voluntarily separated from employment without good cause; charging the claimant with overpayments of \$12,454.00 in benefits recoverable pursuant to Labor Law § 597

(4); \$4,790 in benefits recoverable pursuant to § 4005(b) of the Federal

Supplemental Appropriation Act 2008, Title IV - Emergency Unemployment Compensation, Public Law 110-252; \$10,200.00 in Federal Pandemic Unemployment Compensation (FPUC) repayable pursuant to § 2104 (f) (2) of the Coronavirus

Aid, Relief, and Economic Security (CARES) Act of 2020; and \$1,800 in Lost Wages Assistance benefits recoverable pursuant to 44 CFR Sec. 206.120 (f)(5); and reducing the claimant's right to receive future benefits by eight effective days and charging a civil penalty of \$1,868.10 on the basis that the claimant made willful misrepresentations to obtain benefits.

The Board considered the arguments contained in the written statement submitted on behalf of the claimant. Due deliberation having been had, the Board has reopened and reconsidered its decision.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The claimant worked as a carpenter and skilled laborer for the employer, a construction and property management company, for approximately one year, until March 30, 2020. The employer's business engages in capital projects and building construction, as well as renovations that may include additions. The employer also maintains numerous properties in the area, providing construction and repair services to its clients.

On March 7, 2020, the Governor of the State of New York issued an executive order declaring a statewide disaster emergency due to the COVID-19 pandemic. On March 18 and 20, he issued additional executive orders directing all nonessential businesses to close in-person functions. The order exempted construction businesses. The employer sought further guidance from his local municipality and was advised that his business could continue to operate if jobsites were staffed with no more than one worker at a time. Thereafter, the employer arranged shifts so that each jobsite had no more than one employee working at its particular location. On March 20, the employer informed employees, including the claimant, that they would be working alone at their respective jobsites. The claimant was aware of the executive order.

The claimant did not work from March 21 through March 28, after advising the employer that his brother, with whom he had not been in contact recently, had tested positive for COVID-19. The claimant returned to work on March 29. That day, he worked alone while cleaning up a construction site.

On March 30, the claimant sent the employer a text message, stating "I don't want to do this, but I'm staying home until this passes over. Id [sic] rather be safe." The claimant did not tell the employer that he did not believe that he would be working alone and that he was concerned about his safety for this reason; that he was afraid of contracting COVID-19; or that he believed that he was a nonessential employee performing nonessential services. He also did not request a leave of absence, although the employer would have considered this request had he made it. The employer had continuing work available for the claimant and expected him to report to work after March 29.

The claimant filed a claim for benefits on April 3, 2020, reporting that his employment had ended due to a lack of work. He had the option of indicating that he had quit. Thereafter, the claimant received \$12,454 in regular benefits; \$4,790 in EUC benefits; \$10,200 in FPUC benefits; and \$1,800 in LWA

benefits.

OPINION: The credible evidence establishes that the claimant resigned his employment on March 30, 2020, because he considered his workplace to be unsafe during the COVID-19 pandemic shutdown; was concerned about contracting COVID-19; and believed that he would be in violation of the Governor's executive order if he continued to report to work.

However, we find that the claimant did not take reasonable steps to preserve his employment before quitting. We accept the employer's testimony that all employees, including the claimant, were told that they would be scheduled to work alone at their respective jobsites after March 20 to avoid the risk of COVID-19 infection. The claimant's testimony that "...if I remember correctly, construction could only continue if you would provide someone work where they could work [alone]," in fact, corroborates this. We note that when the claimant returned to work on March 29 after receiving that particular information, he did, in fact, work alone. In light of this, if he still had concerns about working alone after that day, it was incumbent upon him to bring them to the employer's attention before quitting, to give the employer an opportunity to address them.

It was also incumbent upon the claimant to notify the employer of his concern about violating the Governor's executive order by performing what he considered to be nonessential services. Again, by failing to do so before quitting, he deprived the employer of any opportunity to address those concerns so that he could continue in his employment. We additionally note that the employer's business operation falls under the category of essential businesses exempt from that particular order and that the claimant's decision to work on March 29 despite the order is at odds with this particular concern.

With respect to the claimant's general fear of contracting COVID-19, we have held that this does not provide a claimant with good cause to end continuing work (see Appeal Board Nos. 620435 and 617227). Lastly, the claimant did not request a leave of absence because of his concerns, although the employer would have considered such a request had it been made. In light of all of the foregoing circumstances, the claimant has failed to establish good cause to end continuing work for unemployment insurance purposes. He therefore was properly denied benefits and was overpaid. We will now determine whether the overpaid benefits are recoverable.

We find that they are. The regular benefits are recoverable because the claimant made the factually false statement that his employment ended due to a lack of work. The federal benefits are automatically recoverable pursuant to federal law. We further find that the claimant's statement that he was unemployed due to a lack of work constitutes a wilful misrepresentation, as he was aware that continuing work was available to him and that he had voluntarily resigned from same. Accordingly, he is subject to the forfeit and civil penalties imposed by the Department of Labor.

DECISION: The decisions of the Board are rescinded.

The decisions of the Administrative Law Judge are affirmed.

The initial determinations are sustained.

The claimant is denied benefits with respect to the issues decided herein.

MICHAEL T. GREASON, MEMBER